

CUAUHTEMOC ORTEGA (Bar No. 257443)
Federal Public Defender
GEORGINA WAKEFIELD (Bar No. 282094)
(E-Mail: Georgina_Wakefield@fd.org)
GABRIELA RIVERA (Bar No. 283633)
(E-Mail: Gabriela_Rivera@fd.org)
JULIA DEIXLER (Bar No. 301954)
(E-Mail: Julia_Deixler@fd.org)
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-2854
Facsimile: (213) 894-0081

Attorneys for Defendant
JERRY NEHL BOYLAN

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

JERRY NEHL BOYLAN,

Defendant.

Case No. 2:22-CR-00482

**MOTION TO DISMISS
INDICTMENT; MOTION FOR
INJUNCTION, DISCOVERY, AND
JURY INSTRUCTION REGARDING
GOVERNMENT MISCONDUCT**

Hearing Date: September 28, 2023

Hearing Time: 8:00 a.m.

Jerry Nehl Boylan, through his attorneys of record, Deputy Federal Public Defenders Georgina Wakefield, Gabriela Rivera, and Julia Deixler, hereby moves this Honorable Court for an order dismissing the Indictment for the government's substantial interference with witnesses, in violation of Due Process.

In the alternative, Mr. Boylan moves for an order: (1) compelling discovery regarding other instances of potential government misconduct; (2) enjoining the government from engaging in further improper questioning of trial witnesses; and (3) providing a curative jury instruction regarding the government's misconduct in

1 improperly influencing trial witnesses.

2 This motion is based upon the attached memorandum of points and authorities,
3 all files and records in this case, and such evidence and argument as may be presented
4 at the hearing on the motion.

5 Respectfully submitted,

6 CUAUHTEMOC ORTEGA
7 Federal Public Defender

8
9 DATED: August 31, 2023

By /s/ Julia Deixler

10 GEORGINA WAKEFIELD
11 GABRIELA RIVERA
12 JULIA DEIXLER
13 Deputy Federal Public Defenders
14 Attorneys for JERRY NEHL BOYLAN
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I. INTRODUCTION

Jerry Boylan worked as a crewmember for Truth Aquatics boats for decades, and earned a sterling reputation from other company employees for his skills as a captain and his attention to safety. But within days (if not hours) of the tragic accident on the *Conception* that took the lives of 34 individuals, Mr. Boylan became the target of a federal criminal investigation. Federal prosecutors intervened in the safety investigation led by the National Transportation Safety Board (“NTSB”) by limiting the agency’s access to key witnesses. Prosecutors then began interviewing witnesses themselves, and immediately instilled in those witnesses the government’s preferred theory of how and why the accident occurred, and who was responsible. In several interviews with former Truth Aquatics employees, prosecutors and government agents repeatedly asserted the Mr. Boylan was guilty of the offense for which he is now charged. The government also used aggressive interviewing tactics to shape the testimony of those who spoke favorably of Mr. Boylan, and fed witnesses legal authority and facts that were not already in their knowledge. The cumulative effect of these improper tactics has altered the evidence that will be presented at trial, prevented the defense from securing witnesses without the taint of government interference, and violated Mr. Boylan’s Due Process rights.

The Constitution does not tolerate such conduct by the government. This Court should dismiss the Indictment. If the Indictment is not dismissed, the Court should impose other remedies to address the government’s misconduct and prevent ongoing witness tampering.

II. FACTUAL STATEMENT

A. Background of the Case

Jerry Boylan was the captain of the *Conception*, a 75-foot passenger boat owned by the Fritzler Family Trust and operated by Mr. Boylan’s employer, Truth Aquatics, Inc. On September 2, 2019, a fire broke out aboard the *Conception* while it was anchored overnight at Santa Cruz Island. The fire spread quickly, and the boat burned

1 to the waterline. Five people, including Mr. Boylan, who was serving as the captain of
 2 the *Conception*, escaped with their lives and survived the accident. Thirty-three
 3 passengers and one crewmember tragically perished. All the decedents were sleeping
 4 in the bunkroom below deck, and both exits from the bunkroom led to the same area of
 5 the boat, which was engulfed in flames. As a result, Mr. Boylan and the other survivors
 6 were unable to access or save any of the thirty-four people sleeping below deck.

7 The United States Attorney's Office led a criminal investigation with the Coast
 8 Guard Investigative Service (CGIS), the FBI, and the ATF. The ATF conducted an
 9 investigation into the potential cause and origin of the fire, conducting intermediate
 10 scale testing in March and April of 2020, and full-scale testing in October and
 11 November of 2020. The ATF issued a report on January 4, 2021, which hypothesized
 12 that the fire originated in a garbage can on the main deck. ATF could not determine the
 13 cause of the fire. The NTSB also conducted an investigation and published a report on
 14 October 20, 2020. The NTSB concluded that the origin of the fire was likely inside the
 15 aft portion of the salon, not in the garbage can identified by the ATF. The report also
 16 identified contributing causes to the accident and to the loss of life.

17 On December 1, 2020, the government filed an indictment charging Mr. Boylan
 18 with seaman's manslaughter, and filed a First Superseding Indictment on July 19, 2022.
 19 On September 1, 2022, this Court dismissed the government's First Superseding
 20 Indictment for failure to allege an essential element of the offense, gross negligence.
 21 On October 18, 2022, the government filed the current indictment, which alleges that
 22 Mr. Boylan "acted with a wanton or reckless disregard for human life by engaging in
 23 misconduct, gross negligence, and inattention to his duties on [the *Conception*] through,
 24 among other things: 1) his failure to maintain a night watch or roving patrol, despite his
 25 duty to do so set forth in the [COI] ... and 46 C.F.R. § 185.410." (ECF No. 1).

26 **B. The Government's Witness Interviews**

27 **1. Interview of Roy Hauser, Former Owner of Truth Aquatics**

28 Less than two weeks after the accident, on September 13, 2019, agents from the

1 CGIS and Santa Barbara Sheriff's Office served Roy Hauer, the former owner of Truth
2 Aquatics, with a Grand Jury subpoena. On September 18, Mr. Hauser was interviewed
3 at his residence by AUSA Joseph Johns (then the Chief of the Environmental and
4 Community Safety Crimes Section of the USAO in this District), along with two CGIS
5 special agents. *See* Ex. A (Hauser Tr.).

6 Mr. Hauser founded Truth Aquatics in 1970. After suffering a scuba-diving
7 accident in 1978 that left him partially paralyzed and confined to a wheelchair, Mr.
8 Hauser surrendered his captain's license and brought on Glen Fritzler as a co-owner of
9 Truth Aquatics. Mr. Boylan was fired by Truth Aquatics in 1984, starting as a
10 deckhand on the *Conception* where Mr. Fritzler served as captain, and then rising to
11 captain himself in 1985.¹ Mr. Hauser sold his stake in the company to Mr. Fritzler in
12 1999, and Mr. Fritzler was the sole owner of Truth Aquatics until the accident.

13 During the course of the three-hour interview of Mr. Hauser, AUSA Johns asked
14 questions and made comments to influence the statements made by Mr. Hauser
15 regarding his adherence to roving patrol requirements and the purpose of a roving
16 patrol. AUSA Johns also repeatedly asserted the criminal liability of Mr. Boylan, just
17 two weeks into what would be a more than year-long, multi-agency investigation.

18 *i. The government influenced Mr. Hauser to change his testimony*
19 *regarding his use and the purpose of a night watchman.*

20 During the interview, Mr. Hauser stated that when he owned and captained Truth
21 Aquatics boats, which included time periods when Mr. Boylan was initially hired,
22 trained, and worked for the company, he did not implement a roving patrol or "standing
23 watch" at night. Ex. A at 68:

24 AUSA Johns: Okay, um, do you remember the watch standing requirement that
25 says that whenever a T boat, which is a small passenger vessel, uh,
26 under 100 gross ton, tons, whenever you have, at night, whenever
27 you have passengers in the stateroom or, or the bunks or the
berthing area, you must have a suitable number, at least one
watchman, awake and essentially patrolling the vessel to sound the

28 ¹ NTSB, Marine Accident Report at p. 49, § 1.9.2.

alarm for fire, man overboard, or other dangerous situations?

Roy Hauser: We had wheel watches and we had anchor watches at night.

AUSA Johns: Did you have a watchman, did you have somebody standing watch that was also on the lookout for other dangerous situations, like fire or man overboard?

[CGIS agent]: Roving patrol?

Roy Hauser: No, not when I was on the boat.

AUSA Johns then showed Mr. Hauser the 2019 Coast Guard Certificate of Inspection (“COI”) for the *Conception*, and asked Mr. Hauser if he would have complied with it had he been the master of the *Conception*.² Mr. Hauser indicated that he was unable to answer the question, stating, “Well, that’s hard to say though. I don’t answer hypothetical questions,” and later, “I don’t know. I don’t know, I’ve never seen that before.” *Id.* at 73. But AUSA Johns continued to push the line of questioning, and Mr. Hauser ultimately relented, providing the answer that AUSA Johns was looking for:

AUSA Johns: Okay. It’s a simple question. You’ve told us repeatedly that you followed the rules, you followed the regulations, you followed the requirements, right?

Roy Hauser: Yeah.

AUSA Johns: Okay. Now, I’ve showed you this certificate of inspection, which shows that the *Conception* going all the way back to at least 1999, and I can show you every other certificate of inspection up until today’s date, they all have the roving patrol requirement, which says that anytime a passenger is below deck in that berthing or stateroom area, whether underway, at night, during the day, a member of the vessel’s crew shall be designated by the master as a roving patrol. I’m asking you if you would’ve complied with that. We’re trying to understand what people in these situations do. Are you the type of person that would’ve just ignored that and blown it off and not complied? Or would you have complied with the operating license issued by the Coast Guard for that vessel?

Roy Hauser: I would follow the rules and regulations.

AUSA Johns: Okay. Even if you felt that it was unnecessary, you would have complied?

Roy Hauser: Yes sir.

² The COI states, “A member of the vessel’s crew shall be designated by the master as a roving patrol at all times, whether or not the vessel is underway, when the passenger’s bunks are occupied.” NTSB, Marine Accident Report at p. 65, § 2.6.

1 *Id.* at 73-74. The previously verbose Mr. Hauser then began to limit his answers to a
 2 series of clipped “Yes sirs,” agreeing to every question about a requirement that, just
 3 moments prior, he said he was not aware of. Ex. A at 74-75:

4 AUSA Johns: I take it that because the certificate of inspection says you have to
 5 have a roving patrol with passengers of below decks, that you
 would have complied with that?

6 Roy Hauser: Yes sir.

7 AUSA Johns: Okay. And would you expect when... It, when you were off your
 8 shift, and your second mate or your second master was in control of
 the vessel, would you expect your second master to comply with
 that roving patrol as well?

9 Roy Hauser: Yes sir.

10 AUSA Johns: Whenever Mr. Fritzler, back when he used to captain the
 11 *Conception*, when you guys were partners, and even in the years
 after that, would you have expected him to do the same thing? To
 12 comply with the operating license and the requirements of the
 certificate of inspection?

13 Roy Hauser: Yes sir.

14 AUSA Johns: How about Captain Jerry Boylan? And let’s talk about the trip from
 a couple weeks ago. Would you have expected him to comply with
 the roving patrol requirement on the *Conception*’s certificate of
 inspection?

15 Roy Hauser: Yes sir.

16 *See also* Ex. B (Hauser Audio) at 01:36:35-01:37:43.

17 In response to further questioning by the government, Mr. Hauser changed his
 18 testimony entirely from his initial statements regarding a watchman. Although he
 19 previously stated that he was unaware of a night watchman requirement, two hours into
 20 the interview, Mr. Hauser agreed that he complied with it. Ex. A at 91-92:

21 AUSA Johns: Okay. I’d like you to read you [the oath for a Merchant Mariner’s
 22 License] if I could. I do solemnly swear or affirm that I will
 23 faithfully and honestly, according to my best skill and judgment,
 and without concealment and reservation, perform all the duties
 24 required of me by the laws of the United States. I will faithfully and
 honestly carry out the lawful orders of my superior officers aboard
 a vessel. That ring a, ring a bell? Does that sound familiar?

25 Roy Hauser: If that’s what it was, that’s what I signed, that’s what I will do.

26 AUSA Johns: Including following and complying with the laws of the United
 States?

27 Roy Hauser: Absolutely.

28 AUSA Johns: Which include the T boat regulations for small passenger vessels.

1 Roy Hauser: Absolutely.

2 AUSA Johns: You would've, you would've complied with those regulati- ah, ah,
3 forget that. You *did* comply with those laws and those regulations
4 when you operated a- [] . . . And you complied with the watch
5 standing and the operating requirements, correct?

6 Roy Hauser : Yes I did.

7 AUSA Johns: And you would expect any second master or any other master that
8 worked for you in your business to do the same?

9 Roy Hauser: Well, yeah. They were hired there. They know the rules and
10 regulations.

11 The Government also influenced Mr. Hauser to change his testimony regarding
12 the *purpose* of a roving patrol. When first asked about its purpose, Mr. Hauser
13 struggled to find the desired answer, then suggested that its purpose was to watch for
14 anchor drift. AUSA Johns then supplied the specific answer he was looking for:

15 AUSA Johns: Do you know what the purpose of that roving patrol requirement is?

16 Roy Hauser: Yes sir.

17 AUSA Johns: What?

18 Roy Hauser: To have a roving patrol on the boat.

19 AUSA Johns: To look for what?

20 Roy Hauser: Anything.

21 AUSA Johns: Well, anything what? Are they, I mean, are they looking to make
22 sure people have a warm cup of coffee? Are they looking... What
23 are they looking for? What are they trying to prevent?

24 Roy Hauser: Make sure the anchor, make sure the vessel is securely at anchor.

25 AUSA Johns: How about fire? Are they looking for fire aboard the vessel, so they
26 can put it out or sound the alarm?

27 Roy Hauser: Yes sir.

28 Ex. A at 75; Ex. B at 01:37:50-01:38:26. Later, when Mr. Hauser said again that the
primary purpose of a night watch was to check for anchor slippage, AUSA Johns again
redirected Mr. Hauser to agree that the purpose was for detecting fire. Ex. A at 98:

AUSA Johns: Okay. Would you ever have allowed a situation where all of the
crew and all of the masters and captains aboard the second Truth or
the *Conception* were all asleep at the same time?

Roy Hauser: No.

AUSA Johns: Why not?

Roy Hauser: Well because you don't want your boat to end up on the rocks at the
middle of the morning.

AUSA Johns: If there was anchor drift?

1 Roy Hauser: Well, yeah. You have an anchor watch. Always.

2 AUSA Johns: Okay. And would it also be helpful if a fire broke out like it did in
3 1976 with the starter, it's also helpful to have somebody awake to
4 smell the fire, detect for that, right?

5 Roy Hauser: Yes. Yes.

6 AUSA Johns: So that was how you operated the vessel when you were in charge?

7 Roy Hauser: Yes.

8 ii. The government asserted that Mr. Boylan was guilty of criminal
9 negligence during the interview of Mr. Hauser.

10 The government's misconduct was not limited to influencing Mr. Hauser to
11 change his testimony. Through both indirect and direct statements, AUSA Johns also
12 suggested to Mr. Hauser that Mr. Boylan was guilty of criminal negligence. In one
13 such instance, AUSA Johns questioned Mr. Hauser about whether a captain's failure to
14 follow a rule or regulation would constitute a "breach of their duty." *Id.* at 97:

15 AUSA Johns: Do you feel, is it your opinion, that the master of a vessel like the
16 Truth, Vision, or *Conception*, that they can pick and choose what
17 rules and regulations?

18 Roy Hauser: Absolutely not.

19 AUSA Johns: If there's a rule, if there's a safety regulation, they have to comply
20 with it, right?

21 Roy Hauser: Yes.

22 AUSA Johns: Okay. And if they don't that's a breach of their duty, is it not? As
23 the captain?

24 Roy Hauser: Yes.

25 At the conclusion of the interview, AUSA Johns addressed the issue even more
26 directly. He told Mr. Hauser that had there been a night watch on the *Conception* on
27 the evening of the accident, "34 people would be alive." *Id.* at 143:

28 AUSA Johns: You do understand that if Captain Boylan and if Glenn Fritzler had
made sure that Captain Boylan is complying with the-the watchmen
requirement, and if Captain Boylan was also complying with the
roving patrol requirement, you do understand that that fire would
have been found and detected, and 34 people would be alive. And
you seem very angry a-about this. I-I and you seem upset that other
dive-ship company operators are-are-are also, you know, still out
there operating, but if you're aware that the entire industry and the
other captains just don't comply with the regulations, you should
tell us, because we'll go out-

1 AUSA Johns then went one step further, not only repeating his legal conclusion that
 2 Mr. Boylan was guilty but also relaying the statements made by another witness,
 3 Michael Kohls, during his government interview. AUSA Johns told Mr. Hauser that
 4 Mr. Kohls “was not acting as a watchman” or “roving patrol.” *Id.* at 145:

5 Roy Hauser: Now, I don’t know what procedures, what operations, what took
 6 place, who was where, when, I was only told, mind you, that there
 was a crewman in the galley within 30 minutes prior.

7 AUSA Johns: Yeah, well, we interviewed that crew member. And we know why
 he was there.

8 Roy Hauser: I have no idea-

9 AUSA Johns: He was not acting as a watchman. He was not acting as a roving
 10 patrol. He went down to wash the wine cups, the coffee, you know
 the-the- the mugs from the birthday celebrations that night. He
 11 went down there to wash them to get a jump on the following
 morning. That’s all. That’s all. It wasn’t because he was acting as a
 12 watchman, it wasn’t ... because he was acting as a roving patrol. If
 there had been a watchman, if there had been a roving patrol, those
 34 people would still be alive. [] . . .

13 AUSA Johns: The point is, is that a fire can grow awful large and get awful big in
 14 the space of 30 minutes. That’s my point. If-if somebody had been
 awake, if somebody had been conducting the roving patrol, if
 15 somebody had been at the wheel house like you were in 1976, on
 the second Truth, they would’ve smelt the fire when it was still the
 16 size of a dinner plate or smaller. That’s all. That’s the only point.

17 **2. Interview of Milton French, Surviving *Conception* Crewmember**

18 Milton French was the first deckhand on the *Conception* and one of the five
 19 survivors of the accident. He was interviewed by the government just weeks after the
 20 accident—on September 24, 2019. AUSA Johns asked Mr. French about the practices
 21 of Truth Aquatics as compared to other companies when it came to “watch standing
 22 requirements or roving patrol requirement[s].” Mr. French stated, “I talked to Glen
 23 [Fritzler] about it and I specifically just said that ... I’ve been working for this company
 24 for a while. I always thought it was my impression you guys were very safe...” Ex. C
 25 (French Tr.) at 81. In order to disabuse Mr. French of that impression, AUSA Johns
 26 told Mr. French the requirements of the COI and T-boat regulations, suggesting that
 27 Truth Aquatics and Jerry Boylan did not comply with those requirements. *Id.* at 81-82:

28 AUSA Johns: If I would tell you that Certificate of Inspection requires a roving
 patrol to look for dangerous situations and to sound the alarm in

1 case of fire and man overboard things like that

2 Milton French: Hmm.

3 AUSA Johns: When anybody is down in the bunk or berthing area ... um whether
at night or during the day.

4 Milton French: Hmm.

5 AUSA Johns: How would you feel about Truth Aquatics compliance with its
operating license?

6 Milton French: Um

7 AUSA Johns: Would you say... would you feel if they were in compliance with
their operating license and C.O.I?

8 Milton French: No.

9 AUSA Johns: If I were to tell you that there is a regulation of t-boat regulations
[UI] regulations 185 point 4-10 which requires at any time at night.
10 Whether on the way or not [UI] passengers are below um the
bunking area that there must be a watch stood on that vessel to
11 sound the alarm in case of fire, man over board or other dangerous
situation. Would you feel that Truth Aquatics and Captain Boylan
were in the compliance with the law?

12 Milton French: No.

13 Later, when Mr. French did not wholeheartedly agree with AUSA Johns's
14 suggestion that a roving patrol would have prevented the loss of life, AUSA
15 Johns asked if Mr. French was lying to try to protect someone. *Id.* at 83:

16 AUSA Johns: Do you feel that if there had been a roving patrol, somebody awake
and patrolling that vessel at night as required by the C.O. I. that
17 could have made a difference in somebody spotting that fire before
it came so big

18 Milton French: Ugh.

19 AUSA Johns: Logically given the size of that vessel.

20 Milton French: I believe it could have but

21 AUSA Johns: What gives you hesitancy?

22 Milton French: Just simply the fact that we don't know exactly where it started ugh
... um I haven't read the regulations even since word for word
myself. Um it had been explained to me by a number of people.
23 Um, you know friends or whoever ... um but so, I'm not sure what
the exact wording is verbiage but um, but I ... I mean if you have to
24 patrol the entire the boat and it's fifteen minutes [UI] um yeah, I
don't know why I'm hesitate to be honest, its

25 AUSA Johns: Are you trying, are you trying to not get somebody in trouble?

26 **3. Other Interviews in Which the Government Commented on Mr.** 27 **Boylan's Guilt**

28 In several other interviews, the government continued to suggest to witnesses

1 that Mr. Boylan acted negligently or breached his duties. For example, AUSA Johns
 2 asked the following of Brian Priddin, who is a licensed captain and worked on a few
 3 trips on the *Conception* with Mr. Boylan:

4 AUSA Johns: So let me ask you this question again. If during the time period that
 5 you served as second captain aboard the *Conception*, if you had
 6 been made aware of the requirement on the certificate of inspection
 7 that any time passengers or crew are in the bunk area, or the state
 8 room area, whether underway or at anchoring at night, that there
 9 must be a roving patrol. If you had been made aware of that
 provision, and you failed, you knowingly and you intentionally
 failed to comply with that by ensuring that somebody was posted,
 would you say that you yourself were inattentive to your duties? Or
 that you were breaching your duties as a credentialed merchant
 mariner?

10 Brian Priddin: Yeah, if I had failed. If I had known and failed to do that, yes, then
 I would've been failing. I would've been responsible for that, yes.

11 AUSA Johns: Fair enough, and I don't mean to put it on you, I'm actually trying
 12 to understand how we put in context Captain Boylan's inattention
 to duties.

13 Ex. D (Priddin Tr.) at 76.

14 In other interviews, the government asked former Truth Aquatics employees,
 15 "would you agree, that if a captain failed to abide by what's required of him on the
 16 COI, that he is negligent in his duties?" Ex. E (Fitts Tr.) at 60; Ex. F(1) (Fitts Audio) at
 17 1:29:40-1:30:07; *see also* Ex. G (Curto Tr.) at 21-22 ("And if a captain fails to comply
 18 with the stipulations of a COI, would you say that he's negligent in his duties?").

19 One witness, Chris Russello, who was a passenger on Truth Aquatics boats and
 20 later a crewmember, spoke at length about Mr. Boylan's attention to safety and skill as
 21 a captain. Mr. Russello said that "the crew on the *Conception* was top notch" with
 22 respect to safety, and that Mr. Boylan was "probably one of the top five in the state
 23 who knows how to handle boats. Safety was number one with him." Ex. I(i) (Russello
 24 Audio) at 34:18-34:50; Ex. J(i) (Russello Tr.) at 45. Russello continued that Mr.
 25 Boylan thoroughly conveyed safety information to passengers and crew, conducted
 26 headcounts to ensure all passengers were present for safety briefings, and "went over
 27 and over and over about the safety procedures on the boat, all the time. All the time."
 28 Ex. I(i) at 35:00-35:22; Ex. J(i) at 45. Mr. Russello also spoke to how well the

1 *Conception* crew was trained. *See* Ex. I(ii) at 7:40-8:00; Ex. J(ii) at 7 (discussing an
 2 incident where the crew responded rapidly to a passenger with a medical emergency
 3 and stating that “you can tell just by the way they react to a situation how good they’re
 4 trained.”). Later, the government introduced the term “negligence” to the conversation,
 5 asking Mr. Russello if “it was safe to say” that a crew member failed to properly
 6 conduct a night watch “was negligent in what he was supposed to be doing.” Ex. I(ii)
 7 at 30:50-31:05; Ex. J(ii) at 24. The agent asked, “If the captain or crew fails to comply
 8 with the COI, is that negligence as well, in your view?” Ex. I(ii) at 31:05-31:12; Ex.
 9 J(ii) at 24. Russello responded that he’s “not an attorney.” *See also* Ex. H (ROI) at 3.

10 **4. Unrecorded Interviews**

11 Several of the witness interviews were not audio recorded. For those, the
 12 defense is limited to reviewing reports in which case agents distill long interviews into
 13 2-3 page summaries. Nevertheless, several of the reports suggest that more witnesses
 14 were asked similarly inappropriate questions about whether a captain is “negligent in
 15 their duties” for failing to abide by a COI or failing to maintain a night watch. For
 16 example, the report on the interview of Robert Horne, a Truth Aquatics employee from
 17 2014 to 2017, stated, “(PK) Horne stated that if a captain failed to abide by the COI,
 18 they were negligent in their duties.” Ex. K (Horne ROI) at 3. One former employee,
 19 Don Lee Rowell, was interviewed by the Los Angeles Times and stated that the
 20 regulation for a roving patrol “wasn’t really followed . . . I don’t know if you’d call it a
 21 problem or not; it’s something that everyone should have and will have from now on.”
 22 Mark Puente, et al., *Before Conception boat fire, some captains say Coast Guard safety*
 23 *rule was ignored*, LOS ANGELES TIMES (Dec. 29, 2019), available at
 24 [https://www.latimes.com/california/story/2019-12-29/conception-boat-fire-](https://www.latimes.com/california/story/2019-12-29/conception-boat-fire-several-captains-didnt-designate-roving-watches-to-spot-dangers)
 25 [several-captains-didnt-designate-roving-watches-to-spot-dangers](https://www.latimes.com/california/story/2019-12-29/conception-boat-fire-several-captains-didnt-designate-roving-watches-to-spot-dangers). When
 26 interviewed by the government, however, Mr. Rowell was apparently asked
 27 directly about “negligence.” The report of his interview states, “Rowell said that if
 28 a captain failed to do what was required on the Certificate of Inspection he would call

1 this negligence.” Ex. L (Rowell ROI).

2 Other reports suggest that the government also asked witnesses to speculate
3 about whether the lack of a roving patrol was a but-for cause of the deaths in the
4 accident. For example, the report on the interview of James Hrabak, a former Truth
5 Aquatics captain, states, “(PK) Hrabak stated, ‘If we would have had a roving watch,
6 this may not have happened.’” Ex. M (Hrabak ROI) at 3. Earlier in the interview, Mr.
7 Hrabak said he never designated a roving watch while working for Truth Aquatics, and
8 also said, “I know how hot and how rapidly fire can move on boats.” *Id.* at 2. In an
9 interview for the same Los Angeles Times article that featured comments from Mr.
10 Rowell, Mr. Hrabak said that “he told investigators he knew Jerry Boylan, the
11 *Conception* captain, for ‘a long, long, time’ and ‘considered him ‘as fine a skipper of a
12 boat in the industry.’ He recalled an agent’s reply: ‘Then why didn’t he run a roving
13 watch?’” Puente et al., LOS ANGELES TIMES (Dec. 29, 2019). The report summarizing
14 Mr. Hrabak’s interview does not make reference to this exchange.

15 III. LEGAL STANDARD

16 The Sixth Amendment to the Constitution grants the accused the right to offer
17 the testimony of witnesses to present a defense. *Washington v. Texas*, 388 U.S. 14, 19
18 (1967). The Supreme Court has held that few rights are more fundamental. *Chambers*
19 *v. Mississippi*, 410 U.S. 284, 302 (1973). This constitutional guarantee includes the
20 right not only to summon a witness to court, but also to ensure that the witness can
21 testify without undue governmental pressure or influence. The government violates
22 due process when it substantially interferes with a witness’s free and unhampered
23 determination to testify. *See Webb v. Texas*, 409 U.S. 95, 97-98 (1972). “It is
24 imperative that prosecutors and other officials maintain a posture of strict neutrality
25 when advising witnesses of their duties and rights. Their role as public servants and as
26 protectors of the integrity of the judicial process permits nothing less.” *United States v.*
27 *Vavages*, 151 F.3d 1185, 1193 (9th Cir. 1998) (citations omitted). The obligation to
28 maintain neutrality extends to the prosecutor’s communications with *all* witnesses, not

1 just defense-friendly ones. *United States v. Juan*, 704 F.3d 1137, 1141-42 (9th Cir.
 2 2013) (“We see no reason to doubt that the government’s substantial interference with
 3 the testimony of its own witnesses can violate the Due Process Clause.”).

4 Whether substantial government interference occurred is a fact-specific
 5 determination that a defendant must demonstrate by a preponderance of the evidence.
 6 *Vavages*, 151 F.3d at 1190. Factors to consider include statements on the defendant’s
 7 guilt, misrepresentations of the evidence, assertions that witnesses are lying, and
 8 excessive perjury warnings, among others. *See id.* at 1191; *Juan*, 704 F.3d at 1137; *Soo*
 9 *Park v. Thompson*, 851 F.3d 910, 921 (9th Cir. 2017). Due process may be violated not
 10 only where a prosecutor’s tactics “effectively drove the witness off the stand,” but also
 11 where they lead a witness to change their testimony. *See Juan*, 704 F.3d at 1142.
 12 Indeed, courts have recognized that governmental influence that affects the content of a
 13 witness’s testimony is, if anything, *worse* than influence that simply keeps the witness
 14 from testifying. *Id.*;³ *see also Berg v. Morris*, 483 F. Supp. 179, 187 (E.D. Cal. 1980).

15 To prove a constitutional violation, a defendant need not establish that a
 16 government agent specifically and deliberately told a witness to lie, or to change his or
 17 her account in a particular way. Rather, courts have recognized that any message that
 18 can be viewed as influencing a witness’s testimony in some direction can be sufficient.
 19 Even the oft-stated emphasis to “tell the truth” can constitute such pressure, when the
 20 surrounding circumstances make it clear that the speaker has a clear sense of what “the
 21 truth” is. *See Berg*, 483 F. Supp. at 183-84 (finding violation based on judge’s repeated
 22 admonitions to witness to tell the “truth,” where judge had indicated what he believed
 23

24
 25 ³ It also seems clear that the substantial and wrongful interference with a
 26 prosecution or defense witness that does not “drive the witness off the stand,” but
 27 instead leads the witness to materially change his or her prior trial testimony can, in
 28 certain circumstances, violate due process. Indeed, such violations have the potential to
 work *even greater* harm than those that simply result in a blanket refusal to testify.
 Where a witness is coerced into recanting testimony that was favorable to the
 defendant, the harm to the defense involves not merely the *prevention* of prospective
 testimony that *might* have bolstered its case, but the *retraction* of testimony
 that *did* bolster its case. *Juan*, 704 F.3d at 1142.

1 to be the “truth”); *see also Vavages*, 151 F.3d at 1188.

2 IV. ARGUMENT

3 A. The Court should dismiss the Indictment due to the Government’s 4 improper interference with testimonial evidence.

5 Courts are empowered to dismiss an Indictment for government misconduct as
6 an exercise of their inherent supervisory power or to protect a defendant’s due process
7 rights. *United States v. Hawkins*, 2004 WL 3419420, at *2 (N.D. Cal. Dec. 27, 2004)
8 (citing *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979); *United States v.*
9 *Basurto*, 497 F.2d 781, 785 (9th Cir. 1974)). While courts do not invoke dismissal
10 lightly, it is uniquely appropriate here. The government’s improper questioning of
11 witnesses has directly affected the integrity of the fact-finding process by actually
12 altering the evidence that will be presented and the reliability of the trial. *See Berg*, 483
13 F. Supp. at 185 (granting writ of habeas corpus for witness interference, explaining that
14 it “deprives the trier of fact of highly probative evidence” and “raises serious questions
15 about the integrity of the fact finding process, and implicates values basic to civilized
16 notions of fairness and due process”); *Vavages*, 151 F.3d at 1192-93 (reversing
17 conviction for prosecution’s substantial interference with a single witness); *Cf. N.*
18 *Mariana Islands v. Bowie*, 236 F.3d 1083, 1089 (9th Cir. 2001) (government has a
19 “sworn duty . . . to assure that the defendant has a fair and impartial trial”).

20 Here, the effect of the government’s witness interference is insidious and
21 pervasive. Within days of the accident, the government shirked its obligations to a
22 neutral fact-finding process in favor of bolstering a criminal case against Mr. Boylan.
23 In repeatedly asserting Mr. Boylan’s guilt and feeding its own narrative to numerous
24 fact witnesses, the government has tainted the testimonial evidence that will be
25 presented at trial. The government has substantially interfered with trial witnesses in
26 several ways that have already prejudiced Mr. Boylan and undermined the integrity of
27 the judicial process.

28 First, the government has repeatedly told witnesses that Mr. Boylan is guilty.

1 Even in the very early days of the investigation, long before the government had any
 2 real understanding of the cause and origin of the fire, the government infused its theory
 3 of Mr. Boylan's criminal liability in interview after interview. The government
 4 introduced thinly veiled hypotheticals about "negligent" captains, clearly meant to
 5 represent Mr. Boylan.⁴ With other witnesses, the government outright told them that
 6 Mr. Boylan was negligent.⁵ And prosecutors read verbatim certain regulations and
 7 Coast Guard requirements that were not otherwise within witnesses' knowledge.⁶ It is,
 8 of course, the exclusive province of the jury to determine, based on untainted evidence,
 9 whether Mr. Boylan was grossly negligent, and whether that gross negligence caused
 10 the deaths of those who lost their lives in the *Conception* accident. But the prosecution
 11 team has corrupted this process by repeatedly asserting that Mr. Boylan was negligent
 12 and infusing its view of the facts and theory of guilt into the minds of fact witnesses.

13 These tactics were designed to prejudice the witnesses' own perceptions of Mr.
 14 Boylan's conduct. Where witnesses previously believed that Mr. Boylan was
 15 exceedingly competent and safety-conscious, they now have been told by the United
 16 States government that he was negligent and caused the deaths of 34 people. Even
 17 where testimony has not explicitly changed on a specific point, which is difficult for the
 18 defense to assess at this stage of the proceeding and with such limited information
 19 available in the unrecorded interviews, assertions of guilt implicitly encourage people
 20

21 ⁴ See, e.g., Ex. A at 97 (Hauser); Ex. C at 81-82 (French); Ex. D at 76 (Priddin);
 22 Ex. E at 60 (Fitts); Ex. G at 21 (Curto); Ex. J(ii) at 24 (Russello); Ex. K at 3 (Horne);
 Ex. L at 3 (Rowell).

23 ⁵ See, e.g., Ex. A at 143 ("You do understand that if Captain Boylan and if Glenn
 24 Fritzier had made sure that Captain Boylan is complying with the-the watchmen
 25 requirement, and if Captain Boylan was also complying with the roving patrol
 26 requirement, you do understand that that fire would have been found and detected, and
 34 people would be alive"); Ex. C at 81-82 ("Would you feel that Truth Aquatics and
 Captain Boylan were in compliance with the law?"); Ex. D at 76 ("I'm actually trying
 to understand how we put in context Captain Boylan's inattention to duties").

27 ⁶ See, e.g., Ex. A at 73-74 (showing Mr. Hauser a copy of the current *Conception*
 28 COI and questioning him about it despite Mr. Hauser stating he had "never seen that
 before"); *id.* at 91-92 (reciting to Mr. Hauser the oath for a Merchant Mariner's
 License); Ex. C at 81-82 (describing the COI and quoting regulations to Mr. French and
 asking if "Truth Aquatics and Captain Boylan were in compliance with the law")

1 to change their perspectives and discourage witnesses from testifying on Mr. Boylan's
2 behalf at trial. For example, during the interviews of former crewmembers Milton
3 French and Chris Russello, both began by talking about how Mr. Boylan was a safe
4 operator. The government responded by telling these witnesses that the vessel's COI
5 required a roving watch and repeatedly asking if and implying that the failure to follow
6 that rule was negligent. *Supra* Sec. II.B.2-3. In the case of Mr. French, who will likely
7 be called by the government at trial, the government went so far as to ask, repeatedly
8 and aggressively, whether the accident could have been prevented had the vessel had a
9 roving watch. *Id.* As another example, the government's repeated statements to
10 witnesses about roving patrol rules discourage other captains from being truthful about
11 their own practices—practices that are critical to establish a reasonable person standard
12 in a criminal negligence trial. Discovery in this case reveals that many captains did not
13 use a regular roving patrol; in fact, no captain working for Truth Aquatics appears to
14 have had a designated roving patrol. But those captains have now been told by the
15 United States government that this practice constitutes criminal negligence, which
16 discourages them from testifying honestly and being exposed to professional or
17 criminal repercussions. In each case, the government's comments to witnesses
18 immediately after the accident have implanted ideas of guilt that cannot be undone.

19 Second, the government's conduct has already caused certain favorable witnesses
20 to change critical portions of their testimony. Even focusing only on Roy Hauser's
21 testimony demonstrates the significance of the government's interference. Mr. Hauser
22 was the founder of Truth Aquatics and Mr. Boylan's former boss. When he first told
23 interviewers that he did not use a roving patrol, the government refused to accept that
24 answer, stressing that if Mr. Hauser was a captain who followed the rules and
25 regulations, and if the COI required a roving patrol, he would have used one. After that
26 line of questioning, Mr. Hauser's responses and demeanor completely changed, and he
27 began to agree with the prosecutor's entire line of questioning with the sole response,
28 "Yes sir." Ex. A at 74-75; Ex. B at 01:36:35-01:37:43. The prosecutor similarly fed

1 Mr. Hauser his desired answer about the purpose of a roving patrol. Although Mr.
2 Hauser first said he was not concerned about fire and a night watch was used to check
3 the anchor, the prosecutor led Mr. Hauser to agree that a night watch should be in place
4 to detect fire. *See* Ex. A at 98.

5 This change in testimony is unquestionably significant to Mr. Boylan's defense.
6 Throughout its investigation, the government's chief allegation against Mr. Boylan has
7 been that it is negligent for a captain to operate a vessel without an overnight fire watch
8 and that Mr. Boylan knew or should have known that a roving watch was necessary to
9 keep passengers safe from the threat of fire.⁷ Mr. Hauser was the former owner of
10 Truth Aquatics when Mr. Boylan was hired, trained, and became a captain of Truth
11 Aquatics vessels. Mr. Hauser also was a licensed captain himself. Whether he
12 believed that a roving watch was necessary to keep passengers safe from fire is thus a
13 crucial fact going to two key issues in the case; the standard of care (whether it is in
14 fact grossly negligent to operate without a roving watch) and Mr. Boylan's knowledge
15 of the putative risk.

16 Third, the government misrepresented evidence and speculated regarding the
17 accident in ways that materially misled witnesses and tainted their subsequent
18 understandings of the facts. For example, the prosecutor's claim to Roy Hauser that "if
19 Captain Boylan was complying with the roving patrol requirement . . . 34 people would
20 be alive" was not only wildly inappropriate, it was unsupported by any basis in fact. *Id.*
21 at 143. The interview of Mr. Hauser occurred just two weeks after the accident. At
22 that time, the government had not even completed its collection of wreckage from the
23 bottom of the ocean, let alone begun testing possible causes of the fire. In fact, the
24 government had almost no understanding of where or how the fire started or how
25

26 ⁷ As the Court knows, the government's interpretation of 18 U.S.C. § 1115 was
27 that it required only simple negligence and it charged Mr. Boylan initially with only
28 simple negligence. Suggesting to the witnesses that Mr. Boylan was negligent or
inattentive to his duties thus framed the facts within the government's preferred legal
theory of liability under the statute.

1 quickly it progressed. Any suggestion that a particular factor would have prevented the
2 loss of life in the accident was completely unfounded and a clear attempt to turn the
3 witness against Mr. Boylan.

4 Fourth, the government suggested that witnesses were lying when there was no
5 basis to believe so. *See Vavages*, 151 F.3d at 1190 (“[W]e disapprove of such conduct
6 where the prosecutor lacks any substantial basis in the record for believing the witness
7 is lying. That [a witness’s] testimony would have contradicted the testimony of the
8 government’s own witnesses does not form a sufficient basis for the prosecutor’s
9 warning.”). For example, when Milton French did not fully endorse the government’s
10 theory that a roving patrol could have prevented the deaths on the *Conception*, the
11 prosecutor asked, “Are you trying not to get somebody in trouble?” Ex. C at 83. But
12 the prosecutor had no basis to believe that Mr. French was protecting anyone. Mr.
13 French was only relaying his own observations about how rapidly the fire progressed,
14 and doubting that a roving patrol could have prevented it. The prosecutor engaged in
15 similar tactics with Mr. Hauser, accusing him of attempting to protect Mr. Boylan or
16 Mr. Fritzler when he would not fully adopt the government’s theory. Ex. A at 78 (“It
17 seems like you do not wanna be in a position of saying that Jerry Boylan or Glen
18 Fritzler did anything wrong...”).

19 Finally, the defense believes that the extent of the prejudice to Mr. Boylan is
20 even greater than is currently apparent, due to the government’s tactics. The vast
21 majority of witness interviews have been unrecorded. All that the defense has to
22 evaluate are very brief reports, the content of which is self-selected by the government.
23 It is clear that many of the lines of inappropriate questioning have not been documented
24 in these reports. *Compare* Ex. J(ii) at 24 (“If the captain or crew fails to comply with
25 the COI, is that negligence as well, in your view?”), *with* Ex. H (ROI does not contain
26 this question); *compare* Puente et al., LOS ANGELES TIMES (Dec. 29, 2019) (when Mr.
27 Hrabak stated that Mr. Boylan was a skilled captain, an agent replied, “Then why didn’t
28 he have a roving watch?”), *with* Ex. M (ROI does not contain this exchange). Because

1 the government has failed to record every interview, the defense has lost the
2 opportunity to identify a change in testimony or other improper influence that may have
3 occurred with other witnesses. Statements by government investigators that Mr.
4 Boylan was negligent have also discouraged witnesses from coming forward to the
5 defense and being truthful about their own practices.

6 What is apparent from the limited information available is that the government
7 failed to maintain its role as a neutral investigator in many instances. It repeatedly
8 opined on Mr. Boylan's guilt, including to witnesses who would have otherwise
9 testified favorably for the defense, and has shaped the testimony of both defense and
10 government witnesses. The harm done by this inappropriate influence over witnesses
11 cannot be reversed. The appropriate remedy is therefore dismissal.

12 **B. If the Indictment is not dismissed, other remedies are needed to address**
13 **the government's misconduct and prevent ongoing witness tampering.**

14 **1. Additional discovery is necessary to determine which other**
15 **witnesses may have been improperly influenced.**

16 The government has interviewed approximately 235 witnesses in this case, but
17 has only provided complete audio recordings of approximately 40. For the remaining
18 witnesses, the government has only produced in discovery very brief reports, as
19 described above. These reports do not provide the defense with adequate information
20 regarding what questions were asked of the witnesses and how they answered. The
21 defense is therefore limited in evaluating the extent of the prejudice created by the
22 government's improper tactics. The Court should order the government to provide
23 additional discovery regarding each and every witness with whom the government
24 attempted to influence testimony, suggest Mr. Boylan's guilt, or otherwise engage in
25 improper questioning. In particular, the Court should order the government to identify
26 every interview in which the government: (1) asked whether a captain's failure to
27 follow a COI, rule, regulation, or maintain a roving patrol/watchman is "negligent," a
28 "breach of duty," "inattentive to duties," or similar language; or (2) stated directly or

1 indirectly that the decedents in this case would have survived if there had been a roving
2 patrol/night watch on the *Conception*.

3 **2. A curative jury instruction is necessary.**

4 Because of the pervasiveness of the government's improper questioning, the
5 defense maintains that dismissal is the only remedy that can properly address the
6 prejudice to Mr. Boylan in this case. However, if the Court does not dismiss the
7 Indictment outright, the defense would request additional remedies to address the
8 government's misconduct. Courts frequently impose a jury instruction where the
9 government has lost or destroyed evidence. *See, e.g., United States v. Loud Hawk*, 628
10 F.2d 1139, 1152 (9th Cir. 1979) (en banc) (Kennedy, J., concurring), overruled on other
11 grounds by *United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008); *see also United*
12 *States v. Sivilla*, 714 F.3d 1168, 1173 (9th Cir. 2013). A showing of bad faith is not
13 required for a remedial jury instruction. *Sivilla*, 714 F.3d at 1173.

14 Here, a similar instruction is appropriate to inform the jury that the government
15 (whether through bad faith or not) tampered with testimonial evidence, and that such
16 evidence could have been presented differently if not for the government's interference.
17 The defense proposes the following instruction:

18 There is evidence that in interviewing former employees of Truth
19 Aquatics, including individuals who worked with Jerry Boylan, the
20 government engaged in improper questioning that may have influenced the
21 witnesses' testimony. You may infer, but are not required to infer, that
without the government's improper questioning, these witnesses'
testimony would have been unfavorable to the government.

22 Cf. Ninth Cir. Model Instruction No. 3.19 ("If you find that the government
23 intentionally [destroyed][failed to preserve] [insert description of evidence] that the
24 government knew or should have known would be evidence in this case, you may infer,
25 but are not required to infer, that this evidence was unfavorable to the government.").

26 A more specific jury instruction as to Mr. Hauser is required. As the co-owner of
27 Truth Aquatics when Mr. Boylan was hired as a deck hand and worked his way up to
28 captain, Mr. Hauser would have testified that Truth Aquatics did not implement a

1 designated night watch on any vessel. This is critically exculpatory information that
2 would support an argument that Mr. Boylan was never instructed or trained as a deck
3 hand or captain working for the company that he should have a designated night watch.
4 But because of the government's interference, Mr. Hauer's truthful testimony on this
5 point is now lost. The only other person who could provide that testimony is Glen
6 Fritzler, who co-owned Truth Aquatics when Mr. Boylan was hired and owned it
7 outright when the accident occurred. Mr. Fritzler, however, is unavailable as a witness
8 due to his own constitutional right against self-incrimination. Thus, the defense
9 proposes the following instruction specific to the testimony Mr. Hauser would have
10 provided but-for the government's misdeeds:

11 Roy Hauser founded Truth Aquatics in 1970. In 1978, he
12 brought on Glen Fritzler as a co-owner of the company. In
13 1999, Mr. Hauser sold his stake in the company to Mr. Fritzler,
14 and Mr. Fritzler was the sole owner of Truth Aquatics until the
15 accident. If called to testify in this matter, Mr. Hauser would
16 have testified that Truth Aquatics did not implement a
17 designated roving patrol while he was involved with the
18 company.

19 **3. The Court should enjoin the government from engaging in similar**
20 **tactics as the parties prepare for trial.**

21 Finally, if the Court does not dismiss the Indictment, it should impose an order
22 prohibiting the government from engaging in similar tactics that could further damage
23 the fair presentation of evidence at trial and even further violate Mr. Boylan's Due
24 Process rights. The defense therefore requests that the Court order the government to
25 refrain from making any statements or suggestions, either directly or indirectly, to fact
26 witnesses regarding Mr. Boylan's guilt. This should include all statements suggesting
27 that the decedents would be alive if not for conduct or actions of Mr. Boylan or his
28 crew. The Court should further order that the government refrain from asking fact
witnesses to draw legal conclusions or to opine on whether certain conduct constitutes
"negligence," "breach of duty," "inattention to duties," or similar legal conclusions.
Finally, the Court should order the government to refrain from informing fact witnesses

1 about the statements of other witnesses in the case and to refrain from providing
2 witnesses with evidence not already known to them.

3 **V. CONCLUSION**

4 The Court should dismiss the Indictment with prejudice. In the alternative, the
5 Court should: (1) compel the government to identify all interviews in which it engaged
6 in improper questioning, and produce all discovery relating to those interviews; (2)
7 provide a curative jury instruction addressing the government's improper conduct; and
8 (3) enjoin the government from continuing its improper witness questioning.

9 Respectfully submitted,

10 CUAUHTEMOC ORTEGA
11 Federal Public Defender

12 DATED: August 31, 2023

By /s/ Julia Deixler

13 GEORGINA WAKEFIELD
14 GABRIELA RIVERA
15 JULIA DEIXLER
16 Deputy Federal Public Defenders
17 Attorney for JERRY NEHL BOYLAN
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